No. 85-1437

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA WILKINS,

Petitioner,

v.

CHRISTOPHER SAYRES, RONALD LOVEJOY, JOSEPH ENGLEHARDT, EDDIE SANCHEZ, RICHARD BUCHOLTZ,

Respondents.

PATRICIA WILKINS,

Petitioner,

v.

FREDERICK ROUSCH, ORRIE YNIQUEZ, WILLIAM COWHEY, WALTER JACKSON,

Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner submits this Supplement to her Petition for Writ of Certiorari to set forth new authority for the position taken by petitioner in her Petition; to wit, that in civil rights actions brought under 42 U.S.C. 1983 (1982), in instances that the law was clearly

established with respect to the constitutional right alleged to have been violated, no jury instruction may be given on the affirmative defense of qualified immunity; and to demonstrate that the law in the Tenth Circuit is in direct conflict with the law in the Ninth Circuit by virtue of the Tenth Circuit opinion cited herein.

In Lutz v. Weld County School District, 784 F. 2d 340 (10th Cir. 1986) (reported in this week's Federal Reporter advance sheet), the court held:

> As it happens, at the time of this lawsuit federal law clearly prohibited discrimination against an otherwise qualified handicapped person. Defendants were therefore entitled to an instruction on their qualified immunity defense only by raising a fact issue as to whether there were exceptional circumstances such that a

> reasonable person in their positions would not have known the relevant legal standard. [Citation to Harlow omitted.]
>
> No such "extraordinary circumstances" were alleged by the defendants in this case, and there was therefore no fact issue concerning the defense to be submitted to the jury. See Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 3018, 82 L. Ed. 2d 139 (1984) ("no other 'circumstances' are relevant to the issue of qualified immunity").

Lutz fully supports petitioner's position as taken in her Petition and is an accurate statement of the law on qualified immunity. Since the District Court in petitioner's case found, as a matter of law, that the relevant law was clear, and since defendants did not allege any "special circumstances," defendants

were not entitled to have their defense of qualified immunity go to the jury, and it was error for an instruction on qualified immunity to have been given. Hence, the Court of Appeals should have reversed the judgment in favor of defendants.

Additionally, the law on this point is in conflict between the Ninth and Tenth Circuits.

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